

MAR 14 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1281

**In the Supreme Court of the
United States**

October Term, 1982

**SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,**
Appellants

v.

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,**
Appellee

*On Appeal From the Supreme Court of Pennsyl-
vania*

MOTION TO DISMISS

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v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,

Appellee

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS

The Department of Transportation of the Commonwealth of Pennsylvania moves the Court to dismiss the appeal herein on the grounds that the decision of the Pennsylvania Supreme Court sought to be reviewed rests on adequate non-federal grounds.

2 *The Statute Involved and the Nature of the Case*

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Pennsylvania Public Contracts Act (Act of January 23, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602).

The statute provides that bidders on public works projects may withdraw their bids without forfeiture on the condition that they provide to the entity inviting bids, timely notice and credible evidence that the bid price was substantially lower due to a clerical mistake or arithmetical error. The statute expressly excludes bidders on highway construction projects from its benefits.

B. The Proceedings Below

The Appellants, Shelly & Sands, Inc. (Shelly & Sands) and Buckeye Union Insurance Company (Buckeye Union), are a highway contractor and its surety, respectively. Shelly & Sands submitted to the Pennsylvania Department of Transportation the low bid for a highway construction project. When Shelly & Sands was awarded the contract, it refused to sign the agreement, complaining that its bid was substantially lower than intended due to errors it committed in the preparation of the bid. The Department then caused judgment to be confessed against Shelly & Sands and Buckeye Union in the Pennsylvania Commonwealth Court, for the amount of the bid bond plus fees.

Contending that the provision of the Pennsylvania Public Contracts Act excluding bidders on highway projects from its benefits was invalid under the Pennsylvania and Federal Constitutions, the Appellants petitioned the Pennsylvania Commonwealth Court for a rule to show cause why the judgment should not be opened. After receiving evidence, Commonwealth Court Judge Robert W. Williams, Jr., wrote an unreported opinion in support of his April 15, 1981 order refusing to open the judgment. That opinion held that no factual issues could be found to justify the opening of the judgment, that the exclusion of highway contractors did not deprive Appellants of equal protection of the laws, and that, in any event, Shelly & Sands expressly waived its right to withdraw its bid, except pursuant to the provisions contained in the bidding materials. On appeal to the Pennsylvania Supreme Court, that court on November 4, 1982, affirmed the Commonwealth Court's order, *per curiam* and without opinion.

II. ARGUMENT

The Decision of the Pennsylvania Supreme Court Rests on Adequate Non-Federal Grounds

This Court has established "the settled rule that when the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). In applying this rule, the Court has refused to review the denial of a petition for habeas corpus, because it might have rested on the non-federal ground that the reasons set forth in the petition should have been raised in a previous proceeding, *Durley v. Mayo*, 351 U.S. 277 (1956), rehearing denied 352 U.S. 854 (1956), and the determination that property owners could not challenge the validity of a special assessment, because the determination rested on the non-federal ground of laches. *Utley v. City of St. Petersburg, Florida*, 292 U.S. 106 (1934).

In our case, the Pennsylvania Commonwealth Court upheld the validity of the Pennsylvania Public Contracts Act, but also found against the Appellants on the independent non-federal ground that Shelly & Sands expressly waived any right to withdraw its bid except pursuant to certain procedures, writing:

In the instant case, the provisions of the section of the bid instructions, entitled "Withdrawal of Proposals" clearly states: "Each and every bidder who submits a bid specifically waives any right to withdraw it," unless such withdrawal is made or confirmed in writing "before the hour of the date specified in the proposal for the opening thereof." *This language is a "material part of the contract between the parties,"* (citation omitted) and thus *precludes withdrawal two days after the bids have been opened.* (Opinion, P. 3, Appendix C to Appellants Jurisdictional Statement, p. 9a.) (Emphasis added.)

The Commonwealth Court's finding on this point is consistent with established state law that one may waive by agreement the benefits of a statutory provision, if the matter "is not so important as to command the general interest of the body politic as a whole and is of interest to but a class thereof." *Williams v. Wenger*, 319 Pa. 73, 77, 179 A. 242, 244 (1935).

Although the Pennsylvania Supreme Court did not give the grounds for its order of affirmance, which Appellants seek to have reviewed, it might have rested that order on a non-federal ground. Consequently, this court lacks jurisdiction, because:

Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. *Stembridge v. State of Georgia*, 343 U.S. 541, 547 (1952).

Argument

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

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